G. Computer II/III Rules Should Continue To Apply To A LEC For In-Region Enhanced Services; However, Such Rules Should Apply Only To Offerings Of The LEC And Not Offerings Of LEC 272 Subsidiaries

U S WEST agrees with the Commission that its existing Computer II, Computer III, and ONA requirements continue to apply to a LEC's provision of intraLATA enhanced services to the extent consistent with the 1996 Act. However, U S WEST does not believe that the Commission should continue to extend these requirements to LEC-created Section 272 subsidiaries. To the extent that an enhanced or bundled service is offered in a Section 272 subsidiary as provided under the 1996 Act, any concerns about cross-subsidization and bottleneck services are moot. Section 272 subsidiaries are structured by the 1996 Act in such a manner to make any additional regulatory obligations superfluous. The Commission's previous Computer II, Computer III, and ONA rules are no longer necessary or applicable to such entities. The Commission should decline to apply those rules to Section 272 subsidiaries. Additionally, to the extent that a Section 272 subsidiary offers basic or enhanced services, those services, while subject to regulation applicable to all common carriers, need not be subject to the Computer II/III and ONA rules. Again, the Section 272 provisions displace any need for such additional regulations.

The Commission should attempt to ensure that its previous Computer II, Computer III, and ONA requirements are in sync with the provisions of the 1996 Act. It is important for future information services development that a single

regulatory structure be in place. LEC services which have previously been approved under existing CEI plans should be considered to be intraLATA in nature unless the LEC affirmatively makes a decision to offer those services on an interLATA basis. The Commission must provide clear direction for new enhanced services so that they can be considered on a case-by-case basis as to their intra- or interLATA classification.

III. THE SEPARATION REQUIREMENTS PROPOSED BY THE NOTICE ARE UNNECESSARY, UNSUPPORTED, AND ANTICOMPETITIVE

Section 272(a) requires a BOC to engage in enumerated activities -- manufacturing and most interLATA services -- through a "separate affiliate." The Notice proposes a number of separation requirements, ostensibly to implement that provision. Despite a pledge to "minimize the burden on the BOCs,"[31] however, the Notice seeks to impose impossible burdens and inefficiencies on the separate affiliate, often with no explanation of the harms the Commission thereby hopes to avoid. In depicting a separate affiliate, the Notice's palette had far too much "separate" and almost no "affiliate," resulting in a surreal picture of corporate governance: the Notice promises Andrew Wyeth; it delivers Salvador Dali.

[31] Notice ¶ 9.

A. Administrative And Support Services

Section 272(b)(3) requires a BOC and its separate affiliate to have "separate officers, directors and employees." The Notice tentatively concludes that this provision prohibits the sharing of in-house *functions*, including operating, installation and maintenance personnel and the administrative and support services the Commission allowed a BOC to share with its "Computer II" subsidiary.[32] Thus a BOC could not provide accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, or pension services to its separate affiliate.

This would effectively preclude a BOC subsidiary from being a separate affiliate, even though the 1996 Act allows such an arrangement.[33] The BOC could theoretically create such a subsidiary, but it could not staff the subsidiary because the Notice would prohibit it from providing personnel recruitment.[34] Because the Notice would not allow the subsidiary to obtain operating, installation or maintenance help from its parent BOC, the subsidiary apparently must recruit a full staff of technicians, and it must hire them off the street: it could not hire BOC

[32] Id. ¶ 62.

[33] A separate affiliate is simply an affiliate that meets the criteria of § 272 (see § 272(a)(1)); an "affiliate" can be a parent, subsidiary, or sister corporation (§ 3(33)). By contrast, an electronic publishing separated affiliate must be a sister corporation (see § 274(i)(9)).

[34] Indeed, the Notice might not allow the BOC to appoint the officers and directors to manage its own subsidiary.

employees without some degree of prohibited assistance from the BOC. The Notice would also preclude the BOC from financing its subsidiary, likely leaving the subsidiary unable to obtain financing on anything approaching reasonable terms -- if it could get financing at all.[35]

Under this scenario, once the forms the subsidiary, it would be unable to manage the subsidiary under the regime suggested by the Notice. The head of the subsidiary apparently could not report to a BOC officer -- that would be personnel management. The BOC and the subsidiary might not be able to file a consolidated tax return.[36] Indeed, it is not at all clear that the Notice's regime would allow the BOC to audit the books of its subsidiary. The 1996 Act would not permit a separate affiliate to be a BOC subsidiary if it intended to prohibit the BOC from managing that subsidiary.[37]

The situation is little better if the separate affiliate is a sister corporation of the BOC. Though the Notice's separation regime would presumably allow the common parent to manage the affiliate, it asks whether it should preclude the sharing of "outside" services, which would presumably prevent the parent from

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[35] Financing provided or arranged by the BOC would have to comply with Section 272(b)(4), which prohibits credit arrangements that would give a creditor recourse against the BOC's assets. The existence of this provision cuts against any conclusion that Section 272(b)(3) prohibits a BOC from providing any financing to its separate affiliate. If that were so, Section 272(b)(4) would be unnecessary.

[36] Because U S WEST has previously elected to file a consolidated return, it would be required to include its separate affiliates in that return (26 USC § 1501).

[37] Indeed, under an extreme reading of the Notice's requirements, the officers and directors of the BOC could be unable to fulfill their fiduciary obligations to the BOC's shareholders to manage the subsidiary.

providing services to both entities, thus requiring the parent or the separate affiliate to duplicate the prohibited functions.

Burdened by the inefficiencies suggested by the Notice, the separate affiliate -- whether a subsidiary or sister corporation -- would be ill-equipped to compete with integrated giants such as AT&T and MCI. The 1996 Act does not require this result; properly read, the 1996 Act does not permit this result:

- The Notice's proposed interpretation of Section 272(b)(3) is wrong. It reads a prohibition on common officers, directors and employees as a prohibition on common services and functions. The 1996 Act does not intend this leap of logic: when Congress meant to prohibit a BOC from providing services to an affiliate, it plainly said so. Section 274(b)(5)(A) prohibits a BOC and its electronic-publishing separated affiliate from having common officers, directors and employees, just as Section 272(b)(3) does. Nonetheless, Section 274(b)(7)(A) prohibits a BOC from providing personnel hiring or training for its separated affiliate. If Section 272(b)(3) has the sweep suggested by the Notice, Section 274(b)(5)(A) must be equally broad, rendering Section 274(b)(7)(A) superfluous.

- In drafting Section 272, Congress likely had in mind the Commission's experience with Computer II, which introduced the separate subsidiary as a means of preventing the competitive abuses thought to attend the entry of a monopolist into related, competitive businesses. Absent express statutory direction, the Commission should not assume Congress intended a more severe regime than what the Commission promulgated in Computer II.

- Congress would not impose such an oppressive, wasteful regime, only to remove it totally after three years (Section 272(f)(1)).

If the Commission wishes to restrict the functions and services to be shared between a BOC and its separate affiliate, it must do so on a basis other than Section 272(b)(3) and with a clear rationale.

The Notice provides no such rationale. We are thus left to guess at what the Commission thinks it might accomplish by imposing these restrictions -- and the answer is not at all obvious.

Because the issue here is administrative and support services, the only reasonable concern lies in the possibility that a BOC might cross subsidize its separate affiliate by charging too little for the services it provides to its separate affiliate. But the Commission has implemented its affiliate-transaction rules to deal with just that concern, and the 1996 Act requires a separate affiliate to have separate books, records and accounts. The Notice gives no explanation why additional safeguards might be necessary. Again, nothing in the 1996 Act requires the Commission to impose these restrictions.

Moreover, as the Notice notes, these services have been shared under the Computer II regime for over a decade. Reviews of that sharing by independent auditors, state commissions and the Commission's staff have revealed few significant violations. That experience argues against imposing the inefficiencies proposed by the Notice: this prohibition is not needed.

The Commission should allow the BOCs to provide operational, administrative and support services to their separate affiliates -- subject to their complying with the Commission's affiliate-transaction rules.

B. Joint Marketing

The Notice suggests that Section 272(b)(3) prohibits the BOCs from performing a function expressly permitted by the 1996 Act, asking whether "it is necessary" to require a BOC and its separate affiliate to contract with an outside entity for the "joint marketing" permitted by Section 272(g)(2) after the BOC obtains in-region interLATA authorization.[38] Section 272(g)(2) states:

> A Bell operating company may not market or sell interLATA service provided by [a separate affiliate] within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d).

This provision authorizes a BOC to market and sell the interLATA services of its separate affiliate out-of-region at any time and to market and sell those services in-region after it has received in-region interLATA authorization. The permission thus granted runs expressly to the BOC, not to some unaffiliated entity.

If Congress had intended to prohibit a BOC from engaging directly in this activity, as suggested by the Notice, it would surely have found a more direct way to say so than a prohibition on common employees, and it would not have included a provision expressly allowing the activity. Congress intended to allow a BOC -- and not some third party -- to market the interLATA services of its separate affiliate. The Commission should not interfere with that intent.

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[38] Notice ¶ 92.

Assuming the 1996 Act would allow a BOC to provide marketing services to a separate affiliate, the Notice also asks how the Commission should reconcile Sections 272(g)(2), 272(b)(3) and 272(b)(5). As indicated, Section 272(b)(3) (the prohibition on common officers and employees) has no bearing on a BOC's provision of marketing services on behalf of a separate affiliate. Section 272(b)(5) requires all "transactions" between a BOC and a separate affiliate to be "on an arm's length basis" and in writing. The arrangements under which a BOC would provide marketing services to a separate affiliate are presumably "transactions" for purposes of this provision. But what does "arm's length" mean in this context? The subsection presupposes a transaction between the BOC and a separate affiliate, so "arm's length" can have nothing to do with the selection of the BOC to provide the services at issue. Rather, it gets at the terms by which the services will be provided.

The 1996 Act's only legitimate concern in the case of support or administrative services is that the BOC does not undercharge the separate affiliate, thereby improperly subsidizing it. The Commission's existing affiliate transaction rules protect against cross subsidies. If the arrangements by which a BOC provides marketing services to a separate affiliate comply with those rules, nothing further is needed.

Finally, the Notice tentatively concludes -- correctly in our view -- that the restrictions on the BOCs' marketing of their separate affiliates' interLATA services prior to in-region authorization (Section 272(g)(2)) should match the restrictions on

the largest IXCs jointly marketing the BOCs' resold local service with their own interexchange service (Section 271(e)(1)).[39] With these two provisions, Congress obviously intended that the BOCs have at least a chance to provide "one-stop shopping" to their customers at the same time that their largest interexchange competitors have that opportunity. It only makes sense that the restrictions should be coextensive.[40]

The Notice asks whether additional regulations are required to implement Section 272(g)(1), which prohibits a separate affiliate from jointly marketing its interLATA services along with its affiliated BOC's exchange services unless the BOC also allows other entities to sell those services.[41] Of course, non-discriminatory resale of offered services is now available under the Docket 96-98 rules, and no further rules are necessary. Actual experience with the CPE marketplace demonstrates that there is no need for additional regulations in prohibiting a separate affiliate from joint marketing its services along with affiliated BOC services. Under the Commission's Resale and Sales Agency Orders, competition for CPE has flourished. In fact, U S WEST has had in place a very successful CPE

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[39] Id. ¶ 91.

[40] Having said that, we must note that the Commission's Interconnection Order would effectively gut the prohibition in § 271(e)(1) by allowing the IXCs affected by that section to jointly market their interLATA service with local service provided by means of unbundled network elements obtained from the BOC. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325, rel. Aug. 8, 1996 at ¶¶ 356-57.

[41] Notice ¶ 90.

authorized agent-marketing program. In the last ten years, U S WEST's sales from independent authorized agents have grown from less than $4 million to nearly $180 million annually. In an era of exchange-service competition, a BOC is unlikely to eliminate a successful sales channel.

C. Section 272(b)(1)

The Notice tentatively concludes that Section 272(b)(1), which requires a separate affiliate to "operate independently," imposes additional requirements beyond those specified in subsections (b)(2) through (5). It asks for suggestions as to what those requirements should be.[42] Congress obviously did not intend that Section 272(b)(1) would impose additional, specific requirements on the separate affiliate, else it would have articulated them. This provision appears to have been intended as summary language; the balance of Section 272(b) then defines what it means to "operate independently."[43] At most, this provision empowers the Commission to adopt rules needed to ensure the separate affiliate's independence. But any such rules should be adopted only in the face of demonstrated necessity, which likely can be shown only in light of actual experience. We thus submit that

[42] Id. ¶ 57.

[43] The role of this language is perhaps clearer in § 274(b), which contains a virtually identical provision. In that case, Congress put the summary language in the main portion of the section, with the specific requirements in subsequent subsections. Despite the difference in structure, there is no reason to suspect that Congress intended something different in § 272(b)(1).

the Commission should view very skeptically any proposals in response to this request.

The Notice then asks whether the Commission should use its supposed power under Section 272(b)(1) to impose the requirements of Computer II[44] or Competitive Carrier[45] on the separate affiliates.[46] The separation requirements imposed in Computer II address concerns related to the BOCs' provision of enhanced services and CPE. The 1996 Act addresses only the manufacture of telecommunications equipment and the provision of interLATA services.[47] The Computer II safeguards do not deal with those concerns,[48] and the Computer II regime would not fit here.[49] Indeed, the Notice suggests no benefits that might accrue from implementing these requirements in this context and none is obvious.

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[44] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980).

[45] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 98 FCC 2d 1191 (1984).

[46] Id. ¶¶ 58-59.

[47] To be sure, a BOC may provide an interLATA information service only through a separate affiliate, but the concern of Congress clearly arises from the interLATA aspect of such a service. We know that because the 1996 Act allows a BOC to provide intraLATA information services without meeting the separation requirements of § 272.

[48] For example, requiring a BOC to provide "unregulated" services through computer facilities that are separate from those used to provide "regulated" services has no effect on the provision of interLATA service or the manufacture of telecommunications equipment.

[49] Most obviously, a Computer II subsidiary could not be a common carrier; an interLATA separate affiliate will be a common carrier.

The Competitive Carrier requirements come closer to the mark, but the Commission already has them under consideration in a different proceeding and they do not fit the bill on the other statutory criteria.[50] There seems little point to considering these requirements in this proceeding as well.

The general language of Section 272(b)(1) imposes no specific requirements or restrictions on a separate affiliate. Nothing in the Notice justifies -- or even attempts to justify -- the imposition of any such restrictions, including those of Computer II and Competitive Carrier.

D. Sections 272(c)(1) And 272(e)

1. The Meaning of "Discriminate"

Section 272(c)(1) states that a BOC "may not discriminate" in favor of a separate affiliate in certain respects. The Notice asks whether this intends to impose a stricter standard than Section 202, which prohibits only "unjust or unreasonable" discrimination.[51]

Though "discriminate" can mean simply to differentiate among two or more entities or items, in common parlance it connotes an unjust or unreasonable differentiation.[52] That is, to "discriminate" generally means to differentiate on the

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[50] Policies and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, 11 FCC Rcd. 7141 (1996).

[51] Notice ¶ 72.

[52] That was not always the case. When the 1934 Act was adopted, "discriminate" more frequently meant simply to differentiate. This change in common usage over

basis of one or more unjust or unreasonable criteria.[53] Moreover, the justness or reasonableness of a criterion depends on the purpose of the differentiation. For a BOC to differentiate between its separate affiliate and an unaffiliated entity in the price it charges for identical telecommunications facilities would be unreasonable: the identity of the purchasing entity is not a reasonable basis on which to differentiate in this regard. But a BOC can market the interLATA services of its separate affiliate (after it receives in-region authorization) without providing a similar function to other IXCs; in that case the identity of the requesting entity is a reasonable basis for differentiation.

A contrary interpretation would produce absurd results: would the Commission hold that a BOC has violated Section 272(c)(1) because it has reasonably and justly "discriminated" in favor of its separate affiliate? Absent compelling, contrary evidence, "discriminate" must be given its common meaning, including a connotation of unreasonableness and/or unjustness. In interpreting Section 272(c)(1), the Commission should determine what goods, services, facilities, information and standards should be subject to a nondiscrimination requirement: as to which of them is it unreasonable or unjust for a BOC to favor its separate affiliate.

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the last six decades -- rather than any change of Congressional intent -- probably explains the difference in language between the 1934 Act and the 1996 Act.

[53] "[To discriminate] more often means, both in common and particularly in legal parlance, to distinguish or differentiate without sufficient reason." National Labor Relations Board v. Miranda Fuel Co., Inc., 326 F.2d 172, 181 (1963).

In a similar vein, the Notice asks whether a BOC must provide a requesting entity the identical "quality of service or functional outcome" that it provides its separate affiliate, even when this would require the BOC to provide something different than what it specifically provided its separate affiliate.[54] Traditional notions of discrimination would dictate a negative answer: if the entities are not "similarly situated" in a relevant respect, they need not be treated alike.

Indeed, implementing such a requirement would result in discrimination. The suggestion is that a BOC must provide "extra" facilities or services to competitor "A" to obtain identical functionality with its separate affiliate, and it must presumably charge the competitor the same price it charges its affiliate. What then does the BOC charge competitor "B," who can obtain identical functionality using the same facility and service array as the separate affiliate, but who wants the "extra" facilities and services for a different purpose? If the BOC charges "A" and "B" the same amount, "A" will claim discrimination because it is paying the same for a lesser functionality. If it charges "B" more, that competitor will complain that the BOC is discriminating in favor of "A" by charging it less for the same facilities and services.

If one local competitor requires additional services to obtain the same functionality as another, that competitor should pay the extra cost it has thereby caused. Any other result would violate a basic premise of the 1996 Act: cost-based rates. So long as the same services, interconnection options and network elements

[54] Notice ¶ 67.

are available to all competitors on the same terms and conditions, then nothing more is -- or should be -- required. As between a BOC and its competitors, the Commission's affiliate transaction rules ensure nondiscriminatory treatment.

2. Section 272(c)(1) Should Be Interpreted in Light of Its Purposes

The Notice asks whether the various uses of "services," "facilities" and "information" in Section 251(c) and other subsections of Section 272 provide insight into the intended meaning of those terms in Section 272(c)(1).[55] When "service" or "services" appear in these provisions, they are generally accompanied by modifiers to leave no doubt that the reference is to a telecommunications service. "Facilities" seems clearly always to mean "telecommunications facilities." "Information" appears too infrequently to permit any reasonable inference.

The Commission might draw some conclusions from this, but U S WEST believes the more critical questions revolve around what Congress hoped to accomplish by adopting Section 272(c)(1). Thus the goods, services, facilities and information subject to this provision,[56] and how it requires a BOC to treat unaffiliated entities and its separate affiliate,[57] should be determined in light of the evils Congress hoped to prevent.

[55] Id. ¶ 67.

[56] Id. ¶ 76.

[57] Id. ¶ 73.

Traditionally, the concerns presented by the BOCs' providing interLATA services or their manufacturing telecommunications equipment and CPE have revolved around their supposed ability to leverage their local exchange monopoly to gain an unfair advantage in these competitive markets. That is the fundamental harm Congress hoped to preclude by adopting Section 272, and it is the touchstone the Commission should follow in interpreting Section 272(c)(1): Given the intent of Congress, what makes sense?

Telecommunications Services and Facilities. Without question, Section 272(c)(1) must apply to a BOC's provision of telecommunications services and facilities to its separate affiliate, and it must require that the BOC provide those services and facilities to its separate affiliate on the same terms and conditions that it provides them to unaffiliated entities.

But what of telecommunications services or facilities supplied by the separate affiliate to the BOC? In that case, the concern is that the BOC will pay too much, subsidizing the separate affiliate and giving it an unfair advantage over its competitors. The logical answer here is that a BOC should be allowed to pay its separate affiliate no more for interLATA service than other customers would pay for comparable service.

There should otherwise be no limit on the BOC's ability to use its separate affiliate's interLATA service. That is, the Commission should not interpret the 1996 Act to require a BOC to consider using the interLATA services of others or to seek competitive bids for such services. Unless Congress expressly indicated an

intent to interfere with ordinary intra-company relationships, the Commission should not undertake to do so. In this case, Congress did express such an intent -- but only with respect to telecommunications equipment: Section 273(e)(1) requires a BOC to consider the equipment of unaffiliated suppliers and prohibits it from discriminating against such suppliers. Given that specific requirement, there is no room to argue that Section 272(c)(1) imposes any sort of similar requirement on a BOC's use of its separate affiliate's interLATA services.[58]

Administrative and Support Services. As to administrative and support services, the evil to be prevented is, again, solely a matter of cross subsidy. That is, Congress might have had legitimate concerns that a BOC would cross subsidize a separate affiliate by charging too little for the administrative and support services it provides its separate affiliate, or by paying too much for any administrative and support services it receives from the separate affiliate. These concerns, however, are adequately addressed by the Commission's existing affiliate transactions rules. To require, for example, that a BOC offer to provide support services to unaffiliated entities because it provides them to its separate affiliate, would not address the concerns Congress hoped to get at with this provision. Whatever their market power over local exchange services, the BOCs have no monopoly on the provision of support and administrative services; if they "withhold" those services from the

[58] Given § 273(e)(1) and § 273(e)(2), which require the BOCs to adhere to certain procurement standards, U S WEST submits that the Notice's request for suggested procurement procedures (Notice ¶ 77) is misplaced. If such procedures are necessary, they must be adopted pursuant to and in light of § 273.

competitors of their separate affiliates, that will not force those competitors from the market.

Goods and Non-telecommunications Facilities. We believe the same rationale governs a BOC's procurement or provision of "goods" from or to a separate affiliate. If we define "goods" as any tangible item of personal property other than telecommunications facilities, telecommunications equipment, or CPE, the only concern to be addressed is again one of cross subsidy, which is addressed by the Committee's affiliate transaction rules. There is no logic to requiring a BOC to provide a non-telecommunications item to (or to consider acquiring it from) an unaffiliated entity because it has provided that item to (or acquired it from) a separate affiliate.

The same holds true for non-telecommunications facilities. Except where the 1996 Act might otherwise specifically require a BOC to provide access to such facilities (e.g., Section 251(c)(6)), the Commission should not impose any such requirement. The affiliate transaction rules provide adequate protection against any potential cross subsidy.

Information. Finally, "information" should include only information related to the BOC's provision of local exchange services and exchange access, that is, information a competitor needs to obtain or utilize those services. If a BOC's provision of information to (or its receipt of information from) its separate affiliate would give the affiliate an unfair advantage over its competitors, the BOC should be required to provide such information to (or receive it from) unaffiliated providers no

later than it provides that information to (or receives it from) its separate affiliate. If the information cannot give an unfair advantage to a separate affiliate, there is no reason under the 1996 Act to interfere with its flow between the BOC and its affiliate.

Subjecting more information to Section 272(c)(1) would interfere with a BOC's ability to govern its separate affiliate: the free flow of information is essential to corporate governance.[59] While a BOC and a separate affiliate cannot share officers, directors or employees, they must be allowed to share information relative to corporate governance, revenue generation, daily management, appropriate assignments of business opportunities, public policy information and positions, and the like. Congress cannot have intended to require a BOC to share these sorts of general management information with others, and to do so would serve no useful purpose under the 1996 Act.

"Information," for purposes of Section 272(c)(1), must also exclude customer proprietary network information ("CPNI"). The 1996 Act includes a separate provision dealing with CPNI, which strongly suggests this category of information is distinct.[60]

More important, to treat CPNI as subject to the nondiscrimination requirements of Section 272(c)(1) would likely put the BOC in a position of violating

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[59] See, e.g., Aronson v. Lewis, 473 A. 2d 805, 812 (Del. 1984) (prior to making a business decision, corporate directors have a duty to inform themselves). (U S WEST is a Delaware corporation.)

[60] 1996 Act, 110 Stat. at 148 § 222.

either that section or Section 222. If a customer directs a BOC to provide CPNI to the BOC's interLATA separate affiliate, the BOC is obliged to honor that request (Section 222(c)(2)). If that information is also subject to Section 272(c)(1), the BOC would arguably have an obligation to provide it to its separate affiliate's interLATA competitors, an act prohibited by Section 222(c)(1).

To resolve this, the Commission should rule that Section 272(c)(1) does not reach CPNI, which is the exclusive province of Section 222. In that regard, the Commission recently stated its belief that "Congress sought to address both privacy and competitive concerns by enacting Section 222."[61] Given that, Congress likely did not intend to address competitive considerations -- as to CPNI -- again in Section 272(c)(1).

3. Section 272(e) Should Be Interpreted in Light of Its Purposes

The same considerations should inform the Commission's actions with regard to Section 272(e), and particularly Section 272(e)(2). That provision requires a BOC to provide "any facilities, services, or information concerning its provision of exchange access" to "other providers of interLATA services in that market on the same terms and conditions" as it gives its separate affiliate. The Notice asks for

[61] Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221, rel. May 17, 1996 ¶ 15.

comment on the scope of "facilities, services, or information" and on the meaning of "other providers of interLATA services in that market."[62]

The overall thrust of Section 272(e) is clearly toward telecommunications services and facilities, but its subsections address different aspects of that overall rubric. Subsections (1) and (3) are expressly limited to "telephone exchange service" and "exchange access;" subsection (4), on the other hand, applies to "any interLATA or intraLATA facilities or services."

The scope of subsection (2) appears to be limited to exchange access only. The phrase "concerning its provision of exchange access" can be read to modify "facilities, services, or information," or to modify only "information." But if the latter, one must ask why Congress would enact a provision that applies to any type of telecommunications services and facilities, but only to information relating to a very narrow subset of telecommunications services and facilities. Moreover, the protected class of users in this case is limited to interLATA providers who compete with the BOC's separate affiliate in that market. InterLATA providers would be most affected by the terms and conditions on which a BOC offers exchange access. If Congress had intended for this subsection to include all telecommunications services and facilities, it would not likely have applied it only to interLATA providers.

The Notice also seeks comment on the meaning of "other providers of interLATA service in that market."[63] Because the subsection applies to exchange

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[62] Notice ¶ 87.

access, the protection afforded ought to apply to any entity that uses exchange access to provide interLATA service, whether by means of its own facilities, or as a reseller. "Market" in this context appears to carry a geographic connotation, and the reference to "other providers" suggests its scope is coextensive with the geographic territory served by the separate affiliate. That is, wherever the separate affiliate provides originating interLATA service, it must obtain exchange access services and facilities to originate interLATA calls on the same terms and conditions as other interLATA providers; wherever the separate affiliate provides terminating interLATA service, it must obtain exchange access services and facilities to terminate interLATA calls on the same terms and conditions as other interLATA providers.

The Notice asks whether, in implementing Section 272(e)(2), the Commission should consider its own previous proceedings, or the provisions of the Modification of Final Judgment ("MFJ") governing a BOC's provision of facilities, services or information.[64] The 1996 Act amends the Communications Act of 1934; in adopting the 1996 Act, Congress was doubtless informed by the Commission's prior interpretations of the 1934 Act. Except as overruled by the 1996 Act, those interpretations remain viable. There is thus no reason for the Commission not to consider its own relevant precedents in interpreting and implementing this provision.

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[63] Id.

[64] Id.

The MFJ is another matter. It was a judicial consent decree, not a statute, and its provisions, though perhaps similar to the 1996 Act's in some respects, are not the same. More important, the 1996 Act expressly abrogated the MFJ, except that certain of its provisions remain in effect until superseded by the Commission (see Section 251(g)). If Congress had intended the MFJ's provisions relative to a BOC's provision of facilities, services and information to have permanent application, it would have restated those provisions in the 1996 Act. U S WEST therefore submits that these provisions have little or no relevance to the Commission's interpretation and implementation of Section 272(e)(2).

The Notice also seeks comment on the scope of subsection (e)(4), which relates to a BOC's provision of "interLATA or intraLATA facilities or services" to its interLATA separate affiliate.[65] Specifically, the Notice asks whether this provision would include information services and all facilities used in the delivery of information services. U S WEST submits that information services and enhanced services are not covered by that section. Plainly, if a BOC provides underlying services or facilities by which its separate affiliate delivers information services, those underlying services and facilities would be subject to this provision. But an information service is not itself a telecommunications service, and there is no good reason to subject information services to this provision. So long as other carriers can get access to the telecommunications services and facilities the BOC provides,

[65] Id. ¶ 89.

their ability to provide information services in competition with the separate affiliate is unimpeded.

IV. BOC IN-REGION INTERLATA AFFILIATES SHOULD BE CLASSIFIED AS NONDOMINANT BECAUSE THEY WILL HAVE NO MARKET POWER IN INTERLATA MARKETS

Paragraphs 108-152 of the Notice deal with the basic issue of whether BOC in-region, interLATA affiliates should be classified as dominant carriers. First, U S WEST strongly objects to the way in which this issue is presented. The Commission asks -- not once, but twice -- whether it should "relax the dominant carrier regulation that under [its] current rules would apply to in-region, interstate, domestic, interLATA services provided by BOC affiliates."[66] Couching the issue in this manner implies that BOC in-region interLATA affiliates are already classified as dominant. There are, however, no such current rules. Indeed, the Commission had no prior reason to regulate in-region, interstate, domestic interLATA services provided by BOC affiliates because the MFJ barred the BOCs from offering those services.[67]

The Commission's authority to impose the burdens associated with dominant carrier regulation, is tenuous at best. Dominant carrier regulation would be

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[66] Notice ¶¶ 130 & 142 (emphasis added).

[67] The Notice at ¶ 112 quotes the Commission's statement that "if [the MFJ] bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation." Quoting the Competitive Carrier, Fifth Report and Order, 98 FCC 2d at 1198 ¶ 9 n.23. This inconclusive *dictum* can hardly be characterized as a "current rule."

superfluous in view of existing safeguards and the other requirements in the 1996 Act. Congress carefully outlined the conditions for BOC entry into in-region interLATA markets. The detailed separate affiliate requirements of Section 272, coupled with the extensive checklist requirements in Section 271, plus the existing accounting safeguards, price cap regulation of BOCs and other protections (e.g., antitrust enforcement) are more than adequate to protect against improper allocation of costs and unlawful discrimination. Dominant carrier regulation would do nothing to protect against the potential problems identified in the Notice, and would serve only to shackle new entrants into the long distance market with costly and time-consuming encumbrances.

A. BOC In-Region, InterLATA Affiliates Will Not Have Market Power In The Interexchange Market

There is no justification for classifying BOC in-region interLATA affiliates as dominant. Under Section 61.3(o) of the Commission's regulations, a dominant carrier is defined as a "carrier found by the Commission to have market power (*i.e.*, the power to control prices)."[68] Thus, the basic question is whether the BOC in-

[68] On numerous occasions, the Commission has declared that market power requires "the ability to raise prices by restricting output." Competitive Carrier, 95 FCC 2d 554, 558 ¶ 7 (1983)(Fourth Report), *quoting* P. Areeda & D. Turner Antitrust Law 322 (1978). See also Competitive Carrier, First Report, 85 FCC 2d at 10 ¶ 26 ("We will consider a carrier to be dominant if it has market power (i.e., power to control price"); Second Report, 91 FCC 2d 59-60 ¶ 1 (1982)("[W]e [will] classif[y] carriers as either dominant or nondominant depending on their power to control price in the marketplace"); Fourth Report, 95 FCC 2d at 558 ¶ 8 (The "consistent definition of market power focuses on the ability to raise and maintain price above the